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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 286

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

STEAMTUG TALISMAN,
THE LONG ISLAND RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHAUNCEY I. CLARK,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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THE NATURE OF THE CASE

On October 29, 1926, respondent's steamtug *Talisman* with carfloat *No. 58* in tow, came into collision with petitioner's carfloat *No. 37*, which was lying moored at respondent's Long Island City terminal, resulting in damage to *No. 37* (R. 12).

It was agreed between the parties that the collision was occasioned by negligence of tug *Talisman* and that petitioner and respondent were, at the time of the accident, common carriers engaged in interstate commerce.

It is conceded that petitioner duly received by registered

mail from respondent a notice dated July 31, 1920, and that petitioner made no reply thereto. The notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Railroad Company terminals, Long Island City and Bay Ridge, Brooklyn; All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

"This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn" (R. 12-14).

Respondent's defense to the suit is based on the notice set forth above, the validity of which is the only question in this case.

District Court Opinion

The District Court held that the notice was not a valid defense, relying upon the decision of the City Court of the City of New York in *B. & O. Railroad Co.* v. *Long Island Railroad Co.* (the *Patchogue*), 126 Misc. 474, where the Court said:

"Unlike the towage cases, there was no freedom of contract. Plaintiff, willy-nilly in the instant case had to deal with the defendant at its terminal. Defendant was acting as a common carrier pure and simple, and the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequence of his own or his servants' negligence' (citing case)" (pp. 477-8).

The District Court accepted the above reasoning, saying:

"While this decision (*B. & O. Ry.* vs. *Long Island*) is not binding here, it is very apt, and is entitled to respectful consideration * * *. Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 17-18).

The District Court opinion is reported at 52 F. (2d) 691.

Circuit Court of Appeals Opinion

The Circuit Court of Appeals reversed the decision of the District Court and sustained the validity of the notice as a defense on the ground that it constituted a valid contract binding on petitioner, holding that the notice gave the terms upon which respondent would receive floating equipment at its terminal and that when the petitioner sent its carfloat there without objecting to the terms of the notice, it must be regarded as having accepted the offer to receive its carfloat upon the terms indicated (R. 31). The Court held also that such an agreement was authorized under Section 3 of the Interstate Commerce Act authorizing the Interstate Commerce Commission to require any carrier to afford the use of its "terminal" facilities to any other carrier on such terms and for such compensation as the carriers may agree upon or as the Commission may fix as just and reasonable (R. 31). The opinion of the Circuit Court of Appeals is reported at 57 F. (2d) 144.

The Question Presented

The only question presented is whether respondent's notice of July 31, 1920, set forth at page 2 of this brief (R. 13-14) is a valid defense.

Counsel for petitioner assert that there is another question which may be paraphrased as follows: Can a carrier engaged in interstate commerce and maintaining a terminal including float bridges, *exclude* from its terminal, carfloats of a connecting carrier (Petition, p. 5). They argue that

"The decision (below) presupposes that the Long Island Railroad had a right to state 'terms' on which it would agree to permit the New York Central carfloat to receive and discharge freight at its terminal, that is, that it had a right to *exclude* the New York Central carfloat from its terminal unless the conditions were accepted" (Petition, pp. 5-6).

Clearly the Long Island Railroad Company can impose terms. The Interstate Commerce Act, Section 3, Paragraphs 3 and 4, expressly provides for the use of any terminal owned by one carrier and used by another

"on such terms and for such compensation as the carriers affected may agree upon, * * *" (see Appendix A, Section 3, Paragraph 4).

The Circuit Court of Appeals so held (R. 33).

But there has been no attempt to "exclude" petitioner from the use of respondent's terminal unless conditions were accepted. The imposition of conditions does not constitute exclusion. If the conditions were not acceded to (as they were), petitioner had the right to review by the Interstate Commerce Commission. The Circuit Court of Appeals so held (R. 33).

POINT I

THE AGREEMENT WAS AUTHORIZED BY THE INTERSTATE COMMERCE ACT, SECTION 3, PARAGRAPHS 3 AND 4.

The Interstate Commerce Act, Section 3, Paragraphs 3 and 4,* contain regulations requiring connecting carriers to afford terminal facilities to one another. These paragraphs expressly provide for the use of any terminal owned by one carrier and used by another

"on such terms and for such compensation as the carriers affected may agree upon * * *."

In *Pittsburgh & W. V. Ry. Co.* v. *United States,* 41 F. (2d) 806 (decided in the Northern District of Ohio by a Court of two circuit judges and one district judge) construing this paragraph, the Court said:

"We are of opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and *empowers the railroads to agree upon terms which are just and reasonable,* taking into consideration the financial condition of the contracting parties, the ability to pay, the use required, and all other surrounding circumstances" (p. 810) (italics ours).

Counsel for petitioner contend that the provisions of the Interstate Commerce Act do not apply to the instant case. They argue that

"The New York Central in sending its float to the Long Island Terminal was *not* making use of the terminal facilities of the Long Island Railroad *for its own business,* but was sending its float to the terminal for the interchange of traffic

*Printed in Appendix A attached to this brief.

in interstate commerce for which purpose the Long Island was bound to afford 'reasonable and proper facilities'" (Petition, p. 7).

We find no basis for the above statement. Clearly petitioner's carfloat went to the Long Island Railroad terminal to deliver freight. If this is not petitioner's business, we are at a loss to know what its business is. It seems too fantastic for argument to say that such work was *not* petitioner's business.

Counsel for petitioner contend also that even if it is considered that petitioner was making use of the terminal facilities of the respondent at the time of this accident,

"The petitioner's float was lawfully in the float bridge and the rules governing respondent's liability should be no different than if the collision had occurred while the float was in mid-river" (Petition, p. 11).

Not at all! The rules governing a collision in mid-river are entirely different. In the first place, if petitioner's float were in mid-river it would not be a moored vessel, but it would be *in tow*. Liability would then depend upon the fault of the tug which had the float in tow, as well as the other vessel with which the float collided. A more different situation can hardly be imagined.

Counsel for petitioner contend also that the decision below impliedly recognizes the right of a carrier

"to refuse to afford reasonable facilities for the interchange of traffic with its connecting carrier except upon its proposed terms, and of the connecting carrier to refuse to interchange traffic unless such terms are withdrawn, * * *" (Petition, p. 12).

No such implication is contained in the decision below. There was no refusal by respondent to interchange traffic with petitioner, nor was there any refusal by petitioner to

interchange traffic with respondent. This alleged implication is entirely outside of the case. The decision below holds merely that if petitioner objected to the terms imposed by respondent governing the use of its terminal (and no objection was made), petitioner had a right to apply to the Interstate Commerce Commission for a review of the terms (which it did not do).

As the Circuit Court of Appeals said:

"Under Interstate Commerce Act, § 3, par. 49 U. S. C. A. § 3(3), carriers engaged in the transportation of passengers or property must afford reasonable facilities for the interchange of traffic between their respective lines. Under section 3, par. 4, 49 U. S. C. A. § 3(4), 'if the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, * * * on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings' (R. 32).

"The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been 'satisfied to leave them to the Interstate Commerce Commission and the common law'" (R. 33).

Counsel for petitioner even argue that the decision below "assumes" that petitioner

"could decline to send its carfloat to that terminal if it was dissatisfied with the terms" (Petition, p. 6).

Of course, in case petitioner was dissatisfied with the terms its recourse was an application to the Interstate Commerce Commission, not a declination to deliver freight at respondent's terminal, as it was bound to do.

POINT II

RESPONDENT WAS RELIEVED OF LIABILITY FOR DAMAGE TO PETITIONER'S FLOAT BY ITS NOTICE OF JULY 31, 1920.

No question is raised as to the receipt of the notice, nor is any contention made that it was not assented to (Stipulation, R. 13).

It is well settled that a railroad company may relieve itself from liability (to persons other than shippers and passengers) for damage done by its tugs through negligence, and that no question of public policy is involved. The validity of such contracts has been sustained and the method of making them by a notice similar to that in the case at bar has been approved both by the Circuit Court of Appeals for the Second Circuit and the Court of Appeals of the State of New York.

In *Ten Eyck* v. *Director General,* 267 Fed. 974 (C. C. A. 2), certiorari denied, 254 U. S. 646, the Court said that except as to those toward whom a carrier stands in the position of common carrier (passengers and shippers),

"* * * no reason of public policy forbids such carrier from stipulating against its own negligence and making it a part of the contract (p. 976).

"Notice imposing the conditions under which the tug would be accepted having been received, the railroad company was justified in accepting the towage contract, fully understanding that the libellant agreed to these terms. The terms stated in the notice, therefore, became part of the oral contract entered into for the service" (p. 977).

In *The Cutchogue*, 10 F. (2d) 671 (C. C. A. 2), certiorari denied, 273 U. S. 703, this identical notice was in controversy involving damage to a carfloat at the same terminal. The sending of the notice and the practice of handling floats at the terminal were fully discussed and the conditions of the notice upheld and the Long Island Railroad tug exonerated. The Court said:

"It appears that unbridging was regularly done by the Lehigh Valley Railroad tug, when one happened to be present, but the record does not disclose that there was one present on this occasion. The fact that the service was free does not affect the situation between the parties. The letters made no distinction between free service and that which is paid for. Where service of the bailee or carrier is free, the courts have recognized and imposed conditions exonerating them from liability for carriage. *B. & O. Ry.* v. *Voight*, 20 S. Ct. 385, 176 U. S. 498, 44 L. Ed. 560. The use of the appellee's tug for shifting the appellant's float invoked the condition stated by the owner, and they are binding upon the parties" (p. 673).

In *Graves* v. *Davis*, 235 N. Y. 315, the New York Court of Appeals said:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.*, 2 N. Y. 204; *The Margaret*, 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

See also,

Owen McCaffrey's Sons v. *Director General*, 282 Fed. 728 (S. D. N. Y.);

McCormick v. *Shippy*, 124 Fed. 48 (C. C. A. 2);

Long v. *Lehigh Valley R. Co.*, 130 Fed. 870 (C. C. A. 2).

At the time of the accident in the instant case, petitioner was making use of respondent's facilities in two ways. First, petitioner's float, *No. 58* was being shifted by respondent's tug *Talisman;* second, petitioner's float *No. 37* was lying moored at respondent's terminal. In availing itself of these facilities petitioner did so under the terms of the notice which it admittedly received and impliedly assented to and there is no reason why those terms and conditions should not be enforced.

The Court below so held, saying:

"Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon 'terms' for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the 'terms' indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence" (R. 32).

Counsel for petitioner are mistaken in saying:

"Petitioner in dealing with respondent as a connecting carrier was in the same position as any other member of the public dealing with a common carrier" (Petition, p. 10).

Whatever may be the limitations upon a carrier's right to contract while serving the public, *i. e.,* shippers and passengers, no such limitation exists as between connecting carriers. A connecting carrier is in no sense a part of the public as that word is used in defining the obligation of common carriers. As against shippers and passengers, public policy often forbids the carrier from exempting itself from negligence, but this principle does not apply to the dealings between connecting carriers which are deemed equals, neither of which is entitled to special privileges or protection from the law. They may make whatever contracts they please for the division of responsibility or risk as between themselves.

In *Santa Fe Railway Co.* v. *Grant Bros.*, 228 U. S. 177, this Court said:

"It is apparent that there may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual transportation of persons and things whose carriage in other circumstances might be within its public obligation" (p. 185).

In *Central R.* v. *Anchor Line,* 219 Fed. 716 (C. C. A. 2), the Court said:

"The interstate commerce law is not intended for the benefit of carriers, but to protect passengers, shippers and consignees * * *."

"Indeed, as between the carriers, there is no public policy as to which of them should bear any particular charge" (p. 718).

See also *Pittsburgh & W. V. Ry. Co.* v. *U. S.,* 41 F. (2d) 806, 810, referred to above under Point I.

It is clear both from the Act and the decisions that carriers jointly using a terminal are not only permitted but expected to make agreements regarding such use. In the instant case the terms of the notice were part of the agreement under which petitioner used respondent's terminal. The Court below accordingly treated the situation as one involving the relation of one connecting carrier to another, as distinguished from the relation between a common carrier and a shipper or passenger, and held that the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not apply to connecting carriers, saying:

"The distinction drawn by the trial court relied on the fact that the New York Central was obliged to go to the terminal and the Long Island Railroad Company was obliged to re-

ceive the New York Central float and to furnish it terminal facilities. The claimant, therefore, was thought to be in a position similar to that of a common carrier dealing with a passenger or shipper of freight. But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.), 219 F. 716" (R. 32).

POINT III

THERE WAS VALID CONSIDERATION UPON WHICH TO BASE A CONTRACT BETWEEN PETITIONER AND RESPONDENT.

Counsel for petitioner contend that respondent

"had no consideration to offer for such a contract and the act of petitioner in sending its float is shorn of any significance as an acceptance of the respondent's 'terms' for petitioner's act was not voluntary, but an obligatory part of its public duty" (Petition, p. 8).

Whether or not respondent was obligated to accept petitioner's float is beside the point. Respondent was not obligated to let petitioner's float *lie* at its terminal upon *any terms*. It could have insisted that petitioner maintain a tug to handle its own floats and tow them away as soon as loaded or unloaded. On the other hand, if petitioner objected to allowing its equipment to lie at respondent's terminal upon the terms set forth in the notice, petitioner could have made arrangements to tow such equipment away as soon as loaded or discharged. As said in *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2):

"Under the prevailing practice, it can be found that the appellant expected one of the appellee's tugs to perform this

service. While no formal orders for the operation of shifting the float were given, still it must be deemed to have been understood that this work was necessary as a routine in the business and the owner's tacit assent to the conditions may be implied. Undoubtedly the appellant had its choice as to whose tug should do the work. It may have been inconvenient, and perhaps an unnecessary expense, to have its tug at the Long Island Terminal for such use. Appellee was not bound to furnish a tug for bridging or unbridging the float. *Penn. R. Co.* v. *McGirr's Sons Co.* (C. C. A.) 287 F. 334. It did so without compensation (p. 673).

If petitioner had refused to agree to the terms proposed, it could have appealed to the Interstate Commerce Commission. Instead, it acceded to the terms and gave up that right. There is nothing in the record indicating that the terms were not freely agreed upon by the two carriers, though they would have been open to revision if petitioner had declined to accede to the arrangement. As the Court below said:

"It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon *any terms*, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the 'terms' were not freely agreed upon by the two carriers, though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved" (R. 33).

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the

terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 33).

POINT IV

The Authorities.

The only decision cited by counsel for petitioner which is opposed to that of the Court below is *The Patchogue* (*B. & O. R. R. Co.* v. *L. I. R. R. Co.*), 126 Misc. 474, by the City Court of the City of New York, which was affirmed by the Appellate Term without opinion, and leave to appeal to the Appellate Division was denied.

Counsel for petitioner assert also that the decision below is in conflict with the decisions of this Court in *The Syracuse*, 12 Wall. 167, and *Compania de Navegacion* v. *Ins. Co.* (*Wash Gray*), 277 U. S. 66, and with the decisions of the Federal Courts in other Circuits (Petition, p. 12; Brief, pp. 22-3). They apparently overlook the fact that *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C. C. A. 9), came to this Court (259 U. S. 1).

Supreme Court Cases

We shall refer briefly first to the decisions of this Court.

The Syracuse, 12 Wall. 167 (Petition, p. 12; Brief, p. 22), was a *towage* case where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished

the propulsive power was navigated with ordinary care and skill. As this Court said:

"The receipt for the towage—a printed form—was for towing her 'at the risk of her master and owner;' but it seemed that the canalboat had been made fast, the tow put in motion, and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed" (p. 169).

This Court held that the steamboat was not navigated with ordinary care and skill, and she was held at fault.

In *Compania de Navegacion* v. *Ins. Co.* (*The Wash Gray*), 277 U. S. 66, referred to by counsel for petitioner as a decision which followed *The Syracuse, supra* (Petitioner's Brief, p. 22), the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. *Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

In *British Columbia Co.* v. *Mylroie,* 259 U. S. 1, referred to in the petition and petitioner's brief as *Mylroie* v. *British Columbia Mills Tug & Barge Co.,* 268 Fed. 449 (Petition, p. 9; Brief, p. 22), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecssary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

Decisions in Other Circuits

In support of their assertion that the decision below is in conflict with the decisions of the Federal Courts in other Circuits, petitioner has cited certain cases (Brief, pp. 21-3), which we have classified below, showing that with one exception they are not in point.

Towage Cases

The Somers N. Smith, 120 Fed. 569 (Me.);
The Monarch, 235 Fed. 795 (Fla.);
The Sea Lion, 12 F. (2d) 124 (N. D. Cal.);
United States v. *Norfolk-Berkley Bridge Corp., et al.,* 29 F. (2d) 115 (E. D. Va.);
Calzavaro v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4).*

* In this case the Court refused to pass on the towage clause (Opinion, p. 889).

CONTRA*

The Oceanica, 170 Fed. 893 (C. C. A. 2); certiorari denied, 215 U. S. 599;

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); certiorari denied, 273 U. S. 703.

PILOTAGE CASES

Sun Oil Co. v. *Dalzell Towing Co.,* 55 F. (2d) 53 (C. C. A. 2), No. 38 on the docket of this Court;

The Pacific Maru, 8 F. (2d) 166 (D. C. Ga.), where a much broader clause than the one before this Court was passed upon and upheld following an admirable discussion of the cases, saying:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

SIMPLE CONTRACT CASES

B. & O. R. R. Co. v. *Long Island R. R. Co.* (*The Patchogue,*), 126 Misc. 474, decision of the City Court of the

* It is interesting to note that although counsel for petitioner refer to *The Patchogue* (*B. & O. R. R. Co.* v. *Long Island R. R. Co.*), 126 Misc. 474 a City Court case (Brief, pp. 20, 21), and assert that the decision below is opposed to the *decisions* of the Courts of the State of New York, no reference is made to *Graves* v. *Davis,* 235 N. Y. 315, a decision of the New York Court of Appeals, which is in accord with the decision of the Court below.

City of New York, involving the same notice as that in the instant case;

New York Central R. R. v. *Talisman* (The Carfloat No. 37), 57 F. (2d) 144 (C. C. A. 2), the instant case.

It will be seen that all of the cases referred to are "towage" or "pilotage" cases.* A towage case is one in which a vessel with propelling power takes in tow a vessel without propelling power. A typical towage service is that performed by a tug in towing a barge or a carfloat. A pilotage case is one in which a vessel (such as a tug or steamer), which uses her own propelling power, is *assisted* by a tug or tugs in performing a manœuvre, the pilotage consisting of orders from a pilot who goes on the steamer's bridge and directs the entire manœuvre, helm and engine movements of the steamer, as well as the position and movements of the tug or tugs. The pilot usually comes from one of the tugs, and the "pilotage clause" and the meaning thereof grows out of this relation between the pilot and the moving steamer. The typical pilotage case is in docking and undocking steamships with the assistance of tugs. (See *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, No. 38 on the docket of this Court.)

The instant case is neither towage nor pilotage, but one of simple contract.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated, New York,
September 6, 1932.

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*Except *B. & O. R. R. Co.* v. *Long Island R. R. Co.* (*The Patchogue*), 126 Misc. 474, which involved the same notice as in the instant case.

APPENDIX A

Interstate Commerce Act, Section 3, paragraphs 3 and 4:

"§ 3, par. (3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"§ 3, par. (4) *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, or any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be" (49 U. S. C. A. (§1-15a) pp. 157-8).